Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1860

WESLEY WEST, ET AL,
Petitioners,

v.

EXXON CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Now comes Respondent, Exxon Corporation, and files this its Brief in Opposition to the Petition for Writ of Certiorari of Petitioners, Wesley West, et al, and would show the Court as follows:

Opinions Below

The opinion of the Court of Civil Appeals on the first appeal is reported at 496 S.W.2d 212 (Appendix A of Petition). The opinion of the Supreme Court of Texas on the first appeal is reported at 508 S.W.2d 812 (Appendix B of Petition). The Opinion of the Court of Civil Appeals on the second appeal is reported at 543 S.W.2d 667 (Appendix C of Petition).

Jurisdiction

This Court does not have jurisdiction of this case because Petitioners did not timely or properly raise federal questions in the state court, no federal questions are involved in the case, and the state court judgment is based upon non-federal grounds. Petitioners present two questions for review by this Court:

> (1) Does the state court judgment result in the exercise of eminent domain by Respondent and the taking of Petitioners' property without due process of law contrary to the Fifth and Fourteenth Amendments of the United States Constitution?
>
> (2) Did reversal of the trial court judgment by the Court of Civil Appeals following the second trial result in denial to Petitioners of constitutional due process?

The Petition fails to show that the questions presented to this Court were timely or properly asserted as error in the state courts. In fact, those questions were not timely or properly asserted. As *respondents* before the Supreme Court of Texas in the first appeal, Petitioners argued in passing, without mention of any federal question, that Exxon sought to condemn their royalty interest. (See Petition p. 9). In their motion for rehearing filed in the Supreme Court of Texas following its decision, the only constitutional ground raised by Petitioners was an alleged destruction or impairment of their contractual relationship and there was no mention of eminent domain or condemnation. (Petition pp. 9 and 10). Under Texas practice, "The grounds relied upon for the rehearing shall be distinctly specified in the motions." Rule 515, *Texas Rules of Civil*

Procedure. On the second appeal, Petitioners did not assert in the Court of Civil Appeals or in the Supreme Court of Texas that an unlawful taking of their property has occurred.

The second question presented to this Court was not assigned as error until Petitioners filed their motion for rehearing in the Supreme Court following the refusal of that Court to grant a writ of error on their second appeal. Under Texas procedure, Petitioners were required to include assignments of error in their motion for rehearing to the Court of Civil Appeals, and gounds of error not so assigned cannot be considered by the Supreme Court on appeal. Rule 469(c), *Texas Rules of Civil Procedure,* provides as follows:

> (c) Points of Error. The points of error relied upon, separately numbered, shall be . . . germane to some assignment of error in the motion for new trial in the trial court . . . and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals. . . . If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

See, *e.g., Oil Field Haulers Association* v. *Railroad Commission,* 381 S.W.2d 183 (Tex.Sup. 1964) and *East Texas Freight Lines* v. *Loftis,* 148 Tex. 242, 223 S.W.2d 613 (1949), which hold that the Supreme Court cannot consider grounds of error which were not presented to the Court of Civil Appeals. The appeal in the instant case is from the Texas Court of Civil Appeals, since the Texas Supreme Court refused Petitioners' Application for Writ of Error. *Michigan - Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157; see also, *Largent* v. *State of Texas,* 318 U.S. 418; *Sullivan* v. *Texas,* 207 U.S. 416.

The Texas Supreme Court, by refusing to grant a writ of error, did not exercise jurisdiction over the merits of the instant case. In *Merchandise Mart, Inc.* v. *Marcus,* 515 S.W.2d 663 (1974), the Texas Supreme Court held that until that Court grants writ of error, the Court of Civil Appeals' judgment remains the operative judgment.

Petitioners' due process arguments were not presented as error until the motion for rehearing on the application for writ of error to the Texas Supreme Court on the second appeal; therefore, the constitutional arguments were not considered by the Texas Supreme Court. Raising a federal question for the first time in a motion for rehearing addressed to the State Supreme Court is insufficient unless the Court grants the motion and expressly decides the question. *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 128; *Hanson* v. *Denckla,* 357 U.S. 235, 243-244; *Herndon* v. *Georgia,* 295 U.S. 441, 443. Since the arguments were not raised in the Court of Civil Appeals, they were not considered by any state court. It is, therefore, inappropriate for the Supreme Court of the United States to consider under 28 U.S.C. § 1257(c) a constitutional argument that has never been considered by the highest state court.

Even if they had raised federal questions in the Court of Civil Appeals on their second appeal, Petitioners would have been required to present their grounds of error as points of error in their application for writ of error filed in the Supreme Court in order to have those grounds considered by that Court. Rule 469, *Texas Rules of Civil Procedure.* See, *e.g., Sherman* v. *Provident American Insurance Company,* 421 S.W.2d 652 (Tex. Sup. 1967). In their application for writ of error, Petitioners totally failed to assert that reversal of the trial court judgment deprived them of constitutional due process. Having failed to include that ground in their motion for rehearing filed in the Court of

Civil Appeals or in their application for writ of error, it could not be considered by the Supreme Court of Texas on motion for rehearing. Failure to follow state appellate channels precludes Petitioners from obtaining review by this Court. See, *e.g., Herndon* v. *Georgia,* 295 U.S. 441, 443; *Beaty* v. *Richardson,* 276 U.S. 599.

As is clear from the opinion of the Supreme Court of Texas (Petition, Appendix B) and the opinion of the Court of Civil Appeals on the second appeal (Petition, Appendix C), and as will be demonstrated under the "Argument" section of this brief, the state court judgment is based upon non-federal grounds, will have no effect on others than the parties to this suit, turns solely upon an analysis of the particular facts involved, and is correct in all respects.

STATEMENT

This case, devoid of any federal question which would confer jurisdiction on this Court, involved the question of whether Respondent could inject gas for storage purposes into an underground natural gas formation which it owns in fee simple title and whether, if such injection is permissible, Petitioners who own a royalty interest in the gas in the reservoir must be paid their royalty fraction on all gas removed from the reservoir, both native and extraneous injected gas so long as any gas is removed from the reservoir. The case was decided, correctly, on non-federal grounds involving application of common-law rules relating to the ownership of interests in oil and gas, the balancing of interests in a single property or properties physically associated and common-law rules relating to the confusion or commingling of goods.

Exxon Corporation, Respondent, owns the land and minerals in the West Clear Lake (Frio) Field which is located

on the edge of the City of Houston. Petitioners, Wesley West, et al, own non-participating royalty interests in the gas in the reservoir.[1]

The West Clear Lake (Frio) Field is uniquely valuable as a gas storage reservoir both from an engineering and geological standpoint and because of its proximity to Houston to serve the peaking and emergency needs of the large and growing Houston market.

In 1969 when the reservoir was approximately 89 percent depleted, Respondent applied to the Railroad Commission of Texas, the regulatory authority, for a permit to store gas in the reservoir. At a hearing held by the Railroad Commission on September 23, 1969, Petitioners protested. However, the Railroad Commission issued an order on January 20, 1970, authorizing the use of the reservoir for storage. Petitioners failed to appeal from that order and it became final. On March 26, 1970, Petitioners filed suit in the District Court of Harris County to enjoin Humble from using the reservoir as a gas storage reservoir until all native gas had been produced, and in the alternative, Petitioners sought a declaratory judgment requiring Humble to pay their royalty fraction forever on all gas produced from the reservoir irrespective of whether such produced gas be native or stored gas.

Acting under the order of the Railroad Commission, Humble began injecting gas produced from other fields into the West Clear Lake (Frio) reservoir on September

[1] Petitioners are vague in their representations as to the ownership of the parties, but they do not challenge the following holding of the Supreme Court of Texas:

> In the case at hand, the interests of the parties are evident; the Wests possess a royalty interest in native gas produced from the West Clear Lake Field, while Humble owns fee title to the lands, including the subsurface reservoir.

1, 1970, thus preserving the remainder of the reservoir as a viable storage reservoir. Uncontradicted evidence showed that as the reservoir is depleted the area formerly occupied by gas becomes filled with salt water and that the encroaching salt water renders the reservoir unusable for gas storage purposes. Thus it was necessary to begin injection before the native gas had been fully replaced by water. At all times prior to September 1, 1970, and at all times subsequent to that date, Humble has paid Petitioners their royalty interest on all gas produced irrespective of whether such gas was native or extraneous gas.

On the first trial, the District Court denied the injunctive relief but granted the declaratory judgment requested by Petitioners. Both Respondent and Petitioners appealed to the Court of Civil Appeals and that Court reversed the trial court's judgment and remanded the cause with instructions to enter a permanent injunction restraining defendant from further injecting the field and using it as a gas storage reservoir until all native gas had been produced therefrom. *West* v. *Humble Oil & Refining Co.*, 496 S.W.2d 212 (Tex. Civ. App. 1973). The Texas Supreme Court reversed the judgment of the Court of Civil Appeals and remanded the cause to the trial court for further proceedings in accordance with its opinion. *Humble Oil & Refining Co.* v. *West*, 508 S.W.2d 812 (Tex. Sup. 1974). The Supreme Court held that the Court of Civil Appeals at Waco erred in ordering the injunctive relief and, with respect to the royalty question, stated as follows:

> . . . it is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence established with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas.

The Supreme Court further held that Exxon did not and does not lose title to the injected extraneous gas under the doctrine of animals *ferae naturae* and that Exxon is not contractually bound by the terms of the original conveyance to pay Petitioners royalty "forever" on all gas produced from the reservoir.

On remand to the trial court, that court held that Respondent failed to meet its burden of proof and entered judgment requiring Respondent to pay royalties on all gas produced, including extraneous, stored gas. On appeal the Court of Civil Appeals, after a careful review of the evidence, reversed the trial court judgment and rendered judgment declaring that Respondent has no obligation to pay royalties on gas produced in excess of 95.3 billion cubic feet. The opinion of the Court of Civil Appeals (Appendix C of Petition) correctly summarizes the evidence upon which the judgment of that Court is based. The Supreme Court of Texas refused to grant a writ of error with the notation "no reversible error".

Prior to the inception of this litigation, Respondent made a Reserve Study to determine the amount of remaining gas in place in the reservoir and the portion thereof which was recoverable as of January 1, 1969, and submitted this study to the Railroad Commission in connection with its application for authority to store gas in the reservoir. Respondent purchased other outstanding royalty interests but was unable to purchase the royalty interests of Petitioners. Respondent committed itself to pay royalty to Petitioner on the basis of its Reserve Study computation of the *gas in place* on January 1, 1969, recognizing, of course, that the Petitioners could, if they chose to do so, seek a greater recovery in court.

The voluntary commitment undertaken by Respondent contained two provisions to safeguard against any loss to

the Petitioners. The first safeguard was in the difference which exists between "in place" reserves and "recoverable" reserves, a considerable portion of "in place" reserves not being recoverable. Further, relating the commitment to the reserves as they existed on January 1, 1969, assured Petitioners of double payment for all production occurring after that date and prior to September 1, 1970, the date on which injection was commenced. Respondent's computation of "in place" reserves for the reservoir was 38.6 billion cubic feet as of January 1, 1969; its computation of "recoverable" reserves as of September 1, 1970, was 30.1 billion cubic feet. Thus, the two safeguards combined provided for payment of approximately 27 percent in excess of what Respondent believed to have been the recoverable reserves as of September 1, 1970, the reserves upon which Petitioners would have been paid royalty if there had been no storage project.

While the 27 percent margin of safety did not result from a scientific margin of error study, it did provide a margin of safety which was and is believed by Respondent's geologists and engineers to provide an adequate margin of safety to insure against underpayment of royalty, this belief being based upon their Reserve Study and upon their general professional training, experience and observation of the performance of Frio gas fields.

During the first trial, however, the Court asked the following questions of Worthy Warnack, Exxon's geology witness, concerning the Exxon Reserve Study.

"THE COURT: Mr. Warnack, are you familiar with a scientific term called margin of error?

THE WITNESS: I suppose. I believe I know what you mean.

THE COURT: Is this applied in geology?

THE WITNESS: We haven't made any effort to apply this in this study.

THE COURT: Well, then, you are not able to give the Court an opinion as to what in your opinion would be the margin of error in your calculations with respect to this field, is that correct?

THE WITNESS: That's correct."

Thereafter in the trial court and on the first appeal the Petitioners based much of their arguments upon this discussion.

In preparation for the second trial of this cause, in view of the Court's question in the first trial and Petitioners' emphasis thereon, Respondent decided that it should make a "margin of error study". Respondent knew of no way to make a scientific "margin of error study" except to extend each and all of the parameters which determine the volume of gas remaining in place from their respective best and most reasonable points of interpretation to their respective maximum possible extremes. In other words, once the geologist or engineer departs from the best interpretation of the data, the next marker which is a stopping place is the point of maximum possibility under the most liberal interpretation of the data. The margin of error study so conducted (the "Maximum Reserve Study") produced a maximum number of 95.3 billion cubic feet for the total volume of gas which could have been in place in the reservoir as of September 1, 1970. Gas in place always exceeds recoverable gas. The Court of Civil Appeals' judgment on the second appeal declares that Respondent has no obligation to pay royalties on gas produced in excess of 95.3 billion cubic feet.

All of the testimony in the case was presented by Respondent's witnesses, Mr. Worthy R. Warnack, a petroleum

geologist, and Mr. Robert E. Whitson, a petroleum engineer. The testimony of these witnesses is accurately summarized in the decision of the Court of Civil Appeals (Appendix C to Petition). The Petitioners had retained an expert and he was prepared to testify at the second trial. The parties agreed to submit their respective witnesses for depositions at the offices of Petitioners' expert, Butler, Miller and Lents, consulting petroleum engineers and geologists in Houston, on September 25, 1975. After Petitioners and their expert heard the testimony of Respondent's witnesses giving the substance of the Maximum (margin of error) Reserve Study, the Petitioners announced that they had discharged their expert witness, would not submit him for deposition as agreed, and would present no expert testimony at the trial. Consequently, the testimony of Respondent's witness is uncontradicted.

ARGUMENT

(A) In their futile attempt to transform this case into one involving federal questions, Petitioners incorrectly say that the Supreme Court opinion involves the law of eminent domain rather than the law relating to confusion of goods. At pages 4 and 5 of the Petition, Petitioners make this contention as follows:

> The facts of this case fall, of necessity, into one of two categories. This is either a trespass and confusion of goods case where the penalty for a wrongful confusion falls on the confusor; or, in the alternative, it is a condemnation case. The Court herein has ruled out the first alternative and in specific language as follows:
>
> > "As we have noted, it is our view that the acts of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence establishes with reason-

able certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas." (Opinion of Supreme Court, Appendix B, page 14).

By impliedly relegating this case to the area of eminent domain, the Supreme Court has committed such fundamental error as set out specifically above, to merit the serious consideration of this Honorable Court, and the preservation of the ultimate constitutional rights of the property owner here involved. (Appendix 4 and 5).

This case does not involve the law of eminent domain or any unlawful taking of Petitioners' property but clearly is based upon non-federal grounds, *i.e.*, the protection of rights of the owners of various interests in the same property or associated properties and the common-law rules relating to the confusion or commingling of goods.

Petitioners assert that the Texas Supreme Court decision results in a taking of their property "in the public interest and for public necessity and convenience". Though the Court noted that storage of gas in the reservoir benefited the public, the case was decided, correctly, on the basis of Respondent's private right to save and to use the reservoir which it owns. The Court did not, as Petitioners suggest, hold that any property interest of Petitioners could be taken or used for the benefit of the public. The Court's decision clearly was based upon the respective ownerships of the parties. The Court correctly held that Respondent owned the reservoir, and the reference to the public interest was only to recognize the beneficial result of its decision.

The Supreme Court found it reasonable to protect Respondent's rights to preserve and use its reservoir, and to protect it from destruction and to protect the rights of Petitioners and Respondent as to the gas under commingled

goods rules of the common-law. The Supreme Court stated in its opinion that,

> An alternative basis to be considered is whether the trial court judgment may be sustained on a confusion of goods theory. Under *Murchison,* as noted, the extraneous gas is the personal property of Humble. However, by injecting this extraneous gas into the reservoir prior to production of all native gas, Humble has commingled extraneous gas, in which Humble has an exclusive property interest, and native gas, in which the Wests have a royalty interest. The question thus becomes one of determining whether Humble's intentional 'confusion' of the two bodies of gas should result in the forfeiture of its exclusive rights to the extraneous gas. If such a forfeiture is proper, the Wests would be entitled to a royalty on all gas produced, consistent with the trial court judgment.
>
> As a general rule, the confusion of goods theory attaches only when the commingled goods of different parties are so confused that the property of each cannot be distinguished. Where the mixture is homogeneous, the goods being similar in nature and value, and if the portion of each may be properly shown, each party may claim his aliquot share of the mass. *Belcher* v. *Cassidy Bros. Livestock Commission Co.,* 62 S.W. 924 (Tex.Civ.App. — 1901, writ ref'd); *Farrow* v. *Farrow,* 238 S.W.2d 255 (Tex. Civ. App. — Austin 1951, no writ); 1 Am. Jur. 2d *Accession and Confusion,* § 21 (1962); 15A C.J.S. *Confusion of Goods,* § 7 (1967). Additionally, the burden is on the one commingling the goods to properly identify the aliquot share of each owner; thus, if goods are so confused as to render the mixture incapable of proper division according to the pre-existing rights of the parties, the loss must fall on the one who occasioned the mixture. 15A C.J.S. *Confusion of Goods,* § 7, 12 (1967); 1 Am. Jur. 2d *Accession and Confusion,* § 18, 24 (1962). Stated differently, since Humble is responsible for, and is possessed with peculiar knowlege of the gas injection, it is under

the burden of establishing the aliquot shares with reasonable certainty. See *Eaton* v. *Husted,* 172 S.W.2d 493 (Tex. 1943); *Cf. Mooers* v. *Richardson Petroleum Co.,* 204 S.W.2d 606 (Tex. 1947); *Ortiz Oil Co.* v. *Luttes,* 141 S.W.2d 1050 (Tex.Civ.App.—1940, writ dism'd); 1 W. Summers, THE LAW OF OIL AND GAS § 27 (1954).

. . .

As we have indicated, it is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir, if the evidence establishes with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas. The burden of this showing devolves upon Humble after proof by the Wests of their royalty interests, together with proof of Humble's commingling of extraneous and native gas. The threshold question for determination is whether the requisite computation of reserves is capable of establishment with reasonable certainty; and, if so, the further question to be resolved is whether the burden defined above is discharged by Humble under the evidence.

Thus, the Court did not, as Petitioners contend, "impliedly relegate this case to the area of eminent domain". This case could not involve the power of eminent domain because none of Petitioners' property was taken or damaged by Respondent.

The alleged "property taken" according to Petitioners, is "the gas remaining which is deemed 'unrecoverable' under the present technology and the storage reservoir which holds such gas". (Petition p. 13). Petitioners' contentions with regard to "unrecoverable" gas are totally new and have never been presented to any court. Further, they are without merit for several reasons. First, Petitioners own no gas in the reservoir, but are entitled only

to be paid their royalty fraction, in money, of the value of all native gas produced and saved from the reservoir. In *Stephens County* v. *Mid-Kansas Oil & Gas Co.,* 254 S.W. 290 (Tex. Sup. 1923), the Court said:

> Ownership of the gas and oil in place meant having the exclusive right to possess, use, and dispose of the gas and oil. The grantors were clearly divested of the right to either possess, use or dispose of the gas and oil in place in the lands described in the instruments here involved as soon as the instruments were executed. At the same instant, the right to possess, use and dispose of such gas and oil in place passed to the grantees in said instrument and to their assigns. Complete divestiture of title to the gas and oil could hardly be more clearly evinced than by the necessity for an express grant or reservation of even enough gas for domestic use in the grantors' dwellings. Dominion over a thing could not well be completer than it is in these persons who may, at their will, assign it to any other person, with or without consideration, for a time which may be forever. The fact that whoever owns the gas and oil under these instruments, is subject to certain obligations to the former owners, express and implied, with regard to exploration for, and production of, the gas and oil, and with regard to the payment of royalties, in no wise reinvests the former owners with title.

Since a portion of gas is always unrecoverable, then such gas obviously would not have been produced and saved had the reservoir been depleted and Petitioners would not have been entitled to receive royalties on such unproduced gas. More importantly, under the final judgment in this case, Petitioner will receive more than they are entitled to receive under the opinion of the Supreme Court. They will receive a royalty on the maximum amount of gas *in place* in the reservoir which includes the unrecoverable gas, irrespective of whether such gas is recoverable under present technology or even under future technology.

As to "the storage reservoir which holds such gas", Respondent owns the land and minerals and also the matrix of the underlying earth, *i.e.*, the reservoir storage space, subject only to the Petitioners' right to the payment of royalties on minerals that are produced and saved.[2] Since the reservoir is owned by Respondent, use of the reservoir for storage of gas could not constitute a taking of Petitioners' property.

It is obvious from reading the opinion of the Texas Supreme Court that this case was decided on non-federal grounds and that there is no basis, federal or otherwise, for disturbing the final judgment of the Court of Civil Appeals.

The Supreme Court correctly held that Respondent could use its reservoir to store gas produced from other sources so long as Petitioners are paid a royalty on the amount of recoverable native gas which existed in the reservoir at the time injection commenced. Applying the law applicable to confusion of goods, the Court held that,

> . . . it is our view that the act of commingling native and extraneous gas did not impose upon Humble the obligation of paying royalties on all gas thereafter produced from the reservoir if the evidence establishes with reasonable certainty the volume of gas reserves upon which the Wests would have been entitled to royalties, absent injection of extraneous gas.

[2] In its opinion, the Supreme Court stated: "The nature of the respective property interests of the parties should first be noted. As stated, the Wests conveyed fee title to the lands but reserved 'royalties on oil, gas and other minerals which may be produced and saved from the land hereby conveyed,' payable in money. Humble, on the other hand, owns the lands in fee simple, and this includes not only the surface and mineral estates, but also the matrix of the underlying earth, *i.e.*, the reservoir storage space, subject only to the reserved rights of the Wests to the payment of royalties on minerals that are produced and saved. See *Emeny* v. *U.S.*, 188 Ct. Cl. 1024, 412 F.2d 1319 (1969), where it was said that the surface of the leased lands remaining as the property of the respective landowners included the geological structures beneath the surface, together with any such structure that might be suitable for underground storage of extraneous gas produced elsewhere."

Under the final judgment in this case, Respondent has not exercised the power of eminent domain and has condemned nothing. Petitioners' royalties will not be restricted to royalties on the recoverable gas present at the time injection commenced. Instead, Petitioners will recover royalties on the maximum amount of *gas in place* that could have existed in the reservoir, within the bounds of reason, at the time injection commenced. Therefore, they have not been deprived of "the gas remaining which is deemed 'unrecoverable' under the present technology". Because the final judgment of the Court of Civil Appeals allows Petitioners to recover royalties on the maximum gas in place (95.3 billion cubic feet) irrespective of whether such gas is recoverable under present or future technology, Petitioners will receive a windfall. Respondent has not taken or damaged any property belonging to the Petitioners. It has simply stored gas in an underground reservoir which it owns, and will pay Petitioners royalties on the maximum amount of gas that could have existed in the reservoir when injection commenced, even though a large portion of such gas was unrecoverable and royalties would not have been paid thereon if Respondent had not used its reservoir for storage of extraneous gas.

The overriding consideration of the Texas Supreme Court was whether Respondent should be compelled to destroy this uniquely valuable underground storage by depleting the native gas before any injection thus permitting the remaining reservoir sand to be occupied by salt water. Having decided that this should not be compelled, the Court was then confronted with the question whether Respondent should be required thereby to forfeit

a share of all its injected gas to Plaintiffs by being required to pay royalty on all gas thereafter produced, the combined stream of native and injected gas. The Court decided this question by holding that under the law of commingled goods Respondent should only be required to pay royalty on the combined stream produced, a homogeneous mass, until a total volume had been produced equal to the volume of reserves upon which Petitioners would have been paid had there been no injection or commingling. A commingler is not always required to forfeit its aliquot share of the commingled mass.

(B) Under their second question presented, Petitioners argue that the Court of Civil Appeals deprived them of constitutional due process in reversing the trial court judgment and rendering judgment that Respondent had no obligation to pay royalties on gas produced in excess of 95.3 billion cubic feet. Petitioners argue, in effect, that the Texas appellate courts were powerless to reverse the trial court judgment in favor of Petitioners because the only evidence presented by Respondent was opinion testimony of expert witnesses, and such testimony cannot be conclusive. Courts have often held, however, that when the subject matter is one for experts alone and the court or jury has no experience in or knowledge of the specialized subject, the unanimous and uncontroverted opinions of experts is conclusive. *Community Life & Health Insurance Company* v. *McCall,* 497 S.W.2d 358 (Tex.Civ.App. 1973, writ ref'd. n.r.e.); *Broussard* v. *Moon,* 431 S.W.2d 534 (Tex.Sup. 1968); *Standard Life & Accident Insurance Company* v. *Roberts,* 318 S.W.2d 757 (Tex.Civ.App. 1958, writ dism'd); *John Hancock Mutual Life Insurance Co.* v. *Cooper,* 386 S.W.2d 208 (Tex.Civ.App. 1965, no writ); *Coxson* v. *Atlanta Life Ins. Co.,* 142 Tex. 544, 179 S.W.2d 943 (1944); *Bohon* v. *Travelers Insurance Company,* 509 S.W.2d 905 (Tex.Civ.App. 1974, no writ); *Scott* v. *Liberty Mutual*

Insurance Co., 204 S.W.2d 16 (Tex.Civ.App. 1947, writ ref'd, n.r.e.); *National Life & Accident Insurance Company* v. *Shern,* 389 S.W.2d 726 (Tex.Civ.App. 1965, no writ); *Teal* v. *Powell Lumber Co.,* 262 S.W.2d 223 (Tex.Civ.App. 1953, no writ). For federal cases to the same effect, see, *e.g., International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 299, 74 L.Ed. 431 (1929); *Ariasi* v. *Orient Insurance Co.,* 50 F.2d 548, 551 (9th Cir. 1931); *Stafos* v. *Missouri Pacific Railroad Co.,* 367 F.2d 314 (10th Cir. 1966). The cases cited by Petitioners at Pages 24-26 of their application did not involve uncontroverted expert testimony concerning matters of which only an expert could have knowledge.

Under Petitioners' theory, Respondent would have no effective right to appeal from the trial court judgment in this case. It is clear from the above authorities, however, that in reversing and rendering the trial court judgment, the Court of Civil Appeals complied with normal state judicial procedures. Compliance with normal state judicial procedures is not a denial of due process. *Howard* v. *Kentucky,* 200 U.S. 164, (1906). Reversal of a trial court decision by an appellate state court to the prejudice of one of the parties does not violate the due process guarantee of the Fourteenth Amendment. *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444 (1924).

Rule 434, *Texas Rules of Civil Procedure,* authorizes the Texas courts of civil appeals to reverse a district court decision and render judgment. 4 TEX. JUR. 2d *Appeal and Error — Civil Cases* § 930 (1974) at 630 states the general rule as follows:

> Where every fact necessary to the determination of the rights of the parties has been presented and passed on in the trial court, and the record shows that the case has been fully developed, it has been practically the uniform practice in the civil appellate courts to render,

> on reversal, the judgment that the court below should have rendered. . . .

Rendition is especially appropriate where the appellee has intentionally failed to bring forth evidence on a crucial issue when he has had an opportunity to do so at the trial level, and where there has been more than one trial. Both situations are present in the instant case.

Though it is not clear that Respondent's witnesses were "interested witnesses" (see *e.g., Stanolind Oil & Gas Co.* v. *Simpson-Fell Oil Co.,* 85 S.W.2d 325 (Tex.Civ.App. 1935, aff'd, 136 Tex. 158, 125 S.W.2d 263 [1939]), rev'd. on other grounds, 136 Tex. 158, 146 S.W.2d 723 [1941]) their testimony is no less conclusive even if they are considered interested witnesses. Testimony of an interested witness is conclusive if it is clear, direct and positive and there are no circumstances in evidence tending to discredit or impeach such testimony. *Cochran* v. *Wool Growers Central Storage Co.,* 140 Tex. 184, 166 S.W.2d 904 (1943). This is especially true when the opposite party has the means and opportunity of disproving the testimony and fails to do so. *Great American Reserve Ins. Co.* v. *San Antonio Plumbing Supply Co.,* 391 S.W.2d 41 (Tex.Sup. 1965).

This is unquestionably a case where the Petitioners had an opportunity to contradict Respondent's witnesses and failed to do so. In addition to the extensive, direct and positive evidence presented by Respondent, it is most significant that Petitioners offered no testimony and that the evidence presented through Respondent's witnesses stands undisputed in the record. Not only did Petitioners fail to offer any expert testimony, they discharged their expert witness, Mr. P. G. Von Tungeln, after Petitioners and Mr. Von Tungeln heard the testimony of Respondent's witnesses in depositions taken on September 25, 1975. Petitioners had retained Mr. Von Tungeln to testify as an

expert witness in the case, and the depositions of Mr. Von Tungeln and Respondent's witnesses were to be taken by agreement. As shown by Respondent's Exhibits 61 and 62 (the depositions of Mr. Whitson and Mr. Warnack), Mr. Von Tungeln was present during the depositions of Respondent's witnesses. The refusal of Petitioners to tender Mr. Von Tungeln for his deposition after Mr. Von Tungeln had heard the testimony of Respondent's witnesses is documented in the agreement of counsel which is contained at the close of Mr. Whitson's deposition, as follows:

> *Mr. Morgan* (attorney for Respondent): Before we go off the record, I would like something on the record. We'd like to make a statement on the record and see if you will agree to it.
>
> 'By agreement of counsel, it was decided to take the deposition of Mr. Robert Whitson and Worthy Warnack as expected witnesses for Exxon at the trial, and a Mr. P. G. Von Tungeln as an expected witness for the plaintiff, Wesley West, et al. At the agreed time and place, the depositions of Mr. Warnack and Mr. Whitson were taken by counsel for the plaintiff, and at the conclusion, when it came time for the counsel for the defendant to take the deposition of Mr. Von Tungeln, it was announced that the plaintiffs would not use Mr. Von Tungeln as a witness, and that they have no expert witness; will not tender him for his deposition, and will not present expert testimony at the trial.'
>
> *Mr. Stayton* (attorney for Petitioners): That's correct.

Thus, in addition to the fact that its testimony was undisputed, Respondent is entitled to the inference that Petitioners' witness, had he testified, would have given testimony unfavorable to the Petitioners. The inference is com-

pelling when Petitioners discharged their witness after he had heard the deposition testimony of Respondent's witnesses. If Mr. Von Tungeln believed that the maximum gas in place could not have been calculated with reasonable certainty, he would have so testified. If he believed that the reserves could have exceeded the amount shown by Exxon's Maximum Reserve Study, he would have so testified.

In McCormick, *Law of Evidence* (1954 Ed.) at pages 533-534, it is stated that:

> When it would be natural under the circumstances for a party to call a particular witness, or take the stand himself as a witness, or voluntarily to produce documents or other objects in his possession as evidence, and he fails to do so, his adversary may use this failure as the basis for invoking an adverse inference.

In *Barrera* v. *Gannaway,* 130 Tex. 143, 105 S.W.2d 876 (1937) the defendant did not attempt to rebut the evidence presented by the plaintiff. In discussing such failure to testify, the court stated that:

> Of course, this did not supply any omissions in the testimony which it was necessary for plaintiffs in error to produce, but it did strengthen the probative force of the facts which tended to prove their charge. It has even been said that this 'of itself is clothed with a certain probative force.' *Southern Pacific Co.* v. *Ulmer,* 282 S.W. 305, 307 (Tex.Civ.App.). 105 S.W.2d at 877.

In McCormick & Ray, *Texas Law of Evidence,* § 101, the authors state that,

> Where a party fails to call witnesses who have a knowledge of the facts and whose testimony is available to him such failure creates a presumption that the testimony, if produced, would have been unfavorable to the party on the issue involved. The presumption

> may arise from a failure to use witnesses who are accessible or present at the trial, or from the failure to explain or account for the absence of a witness. Moreover, where a party does not attempt to prove a particular fact by a certain person whom he could readily call for that purpose there is a presumption that it could not be done. The presumption is strengthened where the witnesses are the agents or servants of the party.

See, also, *Texas Co.* v. *Charles Clarke Co.,* 182 S.W. 351 (Tex.Civ.App. 1915, writ dism'd); *Texas Unity Oil Co.* v. *Dolman,* 8 S.W.2d 815 (Tex.Civ.App. 1928, writ dism'd); *International Great Northern Railway* v. *McGinty,* 293 S.W. 302 (Tex.Civ.App. 1927, no writ); *First National Bank* v. *Brown,* 15 S.W.2d 563 (Tex.Comm.App. 1929); *McGuire* v. *City of Dallas,* 141 Tex. 170, 170 S.W.2d 722 (1943); *Great American Reserve Ins. Co.* v. *San Antonio Plumbing Supply, supra.*

Further, it is important to remember that this case does not involve the question whether the expert testimony established with reasonable certainty the actual or precise volume of reserves. The question is whether Respondent proved with reasonable certainty that the actual amount of reserves did not exceed the figure developed by the Maximum Reserve Study. That figure resulted from an extension of all geological and engineering interpretations to the maximum possible within the bounds of reason.

Petitioners allege that there is an inconsistency between the Exxon Reserve Study presented at the first trial and the Maximum Reserve Study presented at the second trial, arguing that the evidence in the second trial was impeached by that in the first trial. It is obvious, however, that there is no inconsistency between the two studies. Because the trial court inquired at the first trial as to whether a margin

of error study had been made, and Petitioners complained on appeal that there had been no such study, a margin of error study was made in preparation for the second trial. The only way to make such a study is to extend each parameter to its maximum within the bounds of reason.

After testifying at the second trial that it is reasonably certain that the reserves could not have exceeded the numbers developed in the Maximum Reserve Study, Robert E. Whitson, a petroleum engineer, testified as follows:

> Q. How does this relate to your testimony, if my memory serves me right, in 1972 in the former trial of this case that, in your opinion, the recoverable gas as of 9-1-70 could not have exceeded 38.6 billion cubic feet?
>
> A. I haven't changed that opinion; I still believe it.
>
> Q. What did you base and what do you base that opinion on?
>
> A. That opinion was and still is based on my judgment, on my experience working with this field for eleven years, on seeing four new wells drilled with a minimum of effect on the reserve calculation. It's based on experience in other fields.
>
> Q. But it was not and is not backed up by a scientific turning upward of parameters to their maximum proportions such as in the Maximum Reserve Study?
>
> A. No, sir, it was not a scientific margin of error study. (S.F. 328-29)

Clearly, then, Respondent's witnesses did not abandon the Exxon Reserve Study at the second trial, but they did present the Maximum Reserve Study as a basis for the payment of royalties. Since there is no inconsistency between the two reserve studies, there is not, as Petitioners repeatedly assert, any impeachment of the testimony pre-

sented at the second trial. The Court of Civil Appeals concisely, and correctly, discussed the alleged inconsistency as follows:

> A review of the testimony of Exxon's witnesses shows that their opinion given on the first trial as to the size and extent of the reservoir remains substantially unchanged at the time of the second trial. Their testimony with respect to the Maximum Reserve Study did not reflect any change in their opinion as to the actual location of the parameters of the gas reservoir, but instead indicated their estimate as to the reservoir parameters, extended to the 'bounds of reason.' The expert testimony that the maximum total remaining gas in place on September 1, 1970, could not with reasonable certainty have exceeded 95.3 bcf, is uncontradicted either by direct testimony or by inferences to be drawn from the testimony presented. The only reasonable conclusion that can be drawn from the evidence presented is that afforded by the opinions of Exxon witnesses. (Appendix C to Petition, page 3K, L.)

The Court of Civil Appeals also stated, correctly, that the testimony of Respondent's witnesses,

> was clear, direct, and positive and there was nothing to cause any reasonable suspicion as to the credibility of their testimony. . . . [Respondent] met this burden by presenting clear, positive and unimpeached testimony of experts who, upon sufficient factual bases, stated their estimates of this volume. (Appendix C to Petition, page 3L.)

The following factors which are present in this case demonstrate that the Court of Civil Appeals' judgment, based on that Court's analysis of the facts, is correct.

(1) The nature of the subject matter is so technical and complex as to be beyond the scope of lay knowledge and experience.

(2) Respondent proved its case with highly competent, qualified and experienced experts whose testimony and exhibits were based upon detailed scientific study and extensive scientific data.

(3) The subject matter is one which the Supreme Court of Texas has expressly recognized as subject to proof by experts.

(4) Respondent's expert testimony as to the *maximum* reserves, when compared with the study of actual reserves, resulted in a margin of error that not only protects Petitioners against underpayment, but assures them of a large overpayment.

(5) Petitioners offered no testimony to rebut Respondent's case, and, in fact, discharged their expert witness after he heard the testimony of Respondent's witnesses. Obviously Respondent's evidence was not rebutted for the reason that it is irrebuttable.

(6) The trial court judgment would result in a total and continuing forfeiture which would constitute an unjust and open ended enrichment to Petitioners.

The Court of Civil Appeals correctly reversed the trial court judgment and rendered judgment that Respondent's obligation for the payment of royalties to Petitioners is limited to payment on 95.3 billion cubic feet.

This Court customarily denies certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227. A review of the Court of Civil Appeals' opinion (Appendix C of Petition) and the statements of facts from the second trial, including 62 geological and engineering exhibits,

shows conclusively that this case turns on an analysis of the particular facts involved.

In correctly reversing the trial court judgment based upon a review of the evidence, as it is empowered to do under Texas procedure, the Court of Civil Appeals did not in any way deprive Petitioners of constitutional due process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Brief in Opposition has been served upon Mr. William H. White, Attorney for Petitioners, 2500 Two Shell Plaza, Houston, Texas, 77002, by placing same in the United States Mail, postage prepaid, certified mail, return receipt requested, on this the 22nd day of July, 1977.

Walter B. Morgan